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April 28, 2022

Via Email and ECF

The Honorable Roanne L. Mann
United States Magistrate Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: United States v. Frank James, 22-MJ-429 (RLM)

Dear Judge Mann,

Mr. James has informed us that on April 26, 2022—twelve days after his right to counsel attached—FBI agents entered his cell at MDC Brooklyn, questioned him, took multiple buccal swabs of his DNA, and directed him to sign certain documents. Contrary to standard practice, the government committed this intrusion absent advance notice to counsel, depriving us of an opportunity to be heard or to be present. Neither did the government provide subsequent notice to counsel. The agents did not provide Mr. James with a copy of the warrant or a receipt, in violation of Federal Rule of Criminal Procedure 41(f)(1)(C). Only when we asked, after learning of this from our client, did the government provide a copy of only the search warrant. *Ex. A*. The government did not provide the underlying affidavit or any explanation for the deviation from standard procedure by failing to provide notice to counsel and an opportunity to be present.

Mr. James's right to counsel attached when the Court appointed counsel on April 13, 2022. *Rothgery v. Gillespie County, Tex.*, 554 U.S. 191, 194 (2008). The Sixth Amendment guarantees the right to the effective assistance of counsel at all "critical stages" of the criminal proceedings, including interrogation by government agents once the proceedings have been initiated. *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009). Interrogation of a defendant without defense counsel present after the filing of formal charges "contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime." *See Massiah v. United States*, 377 U.S. 201, 205 (1964) (internal quotations omitted).

It is the standard practice in this District that when the government obtains a search warrant for buccal swabs from a represented, post-arraignment defendant, the government informs counsel of same before its execution, and offers an opportunity to be present. This serves as a safeguard to protect the rights of represented defendants. Here, because the government failed to provide notice to counsel before questioning and searching Mr. James, their practice risked violations of Mr. James's core constitutional rights under the Fourth, Fifth and Sixth Amendments.

Using a swab on a person's inner cheek in order to obtain DNA evidence is a search, subject to constitutional scrutiny. *Maryland v. King*, 569 U.S. 435, 446 (2013). Though many understate the nature and extent of the encroachment when a person is subjected to swabbing for DNA, such a procedure is an "intrusio[n] into the human body" and amounts to "an invasion of cherished personal security." *Id.* (citations omitted). The FBI took these samples well outside the booking process; Mr. James had been booked for thirteen days. *King*, 569 U.S. at 465. Any search warrant issued here may have been unreasonable, where the same agents had already taken Mr. James's DNA on April 13, 2022. And by depriving counsel of the ability to be present to witness the procedure, as occurs routinely, they lessened Mr. James's ability to later challenge the validity of the physical taking of the sample.

So that we may file a suppression motion seeking the appropriate relief for these potential constitutional violations, we seek an Order from this Court that the government provide undersigned counsel with the underlying affidavit upon which this search warrant was issued, any and all documents signed by Mr. James, and the sum and substance of any statements made by him on April 26, 2022. Fed. R. Crim. P. 16(a)(1)(A).

Respectfully Submitted,

/s/

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cc: AUSA Sara K. Winik (by email and ECF)
AUSA Ellen Sise (by email and ECF)
AUSA Ian Richardson (by email and ECF)

EXHIBIT A

Hon. Lois Bloom U.S.M.J.
Printed name and title

Return

Case No.:

22-MJ-457

Date and time warrant executed:

Copy of warrant and inventory left with:

Inventory made in the presence of :

Inventory of the property taken and name of any person(s) seized:

Certification

I declare under penalty of perjury that this inventory is correct and was returned along with the original warrant to the designated judge.

Date: _____

Executing officer's signature

Printed name and title